No. 77-505

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONALD C. IRWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-505

DONALD C. IRWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of his conviction for failing to file an income tax return on the grounds that the evidence did not support the verdict and that the trial court erred in refusing to allow him to be represented by a non-lawyer.

After a jury trial in the United States District Court for the District of Wyoming, petitioner was convicted of willfully failing to file an income tax return for 1974, in violation of 26 U.S.C. 7203. He was sentenced to four months' imprisonment and fined $2,000. The court of appeals affirmed (Pet. App. A, pp. 1-7).

The proof showed that petitioner, an electrician, had income during 1974 in excess of $22,000. The Form 1040 that he filed contained his name, address, and an entry

indicating that he was entitled to a refund of $4,694. The form showed nothing else except petitioner's objections to the questions asked. In response to all questions dealing with income, petitioner wrote "Object—Self-incrimination" (Pet. App. A, p. 2).

1. Petitioner contends (Pet. 22-27) that the evidence was insufficient to support the verdict. But this argument rests on the erroneous assumption that the claims of privilege set forth on his Form 1040 were valid so that he could not properly be convicted of failure to file a return. Petitioner's assumption is not supported by *United States* v. *Sullivan,* 274 U.S. 259, upon which he relies (Pet. 22). There, the Court affirmed the conviction of a bootlegger for failing to file an income tax return, holding that the Fifth Amendment did not protect him from the requirement of filing a return. In so holding, the Court stated that if the "form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all" (274 U.S. at 263).

Here, however, petitioner did not claim the privilege with respect to certain questions. To the contrary, he in effect asserted a blanket claim of privilege against filing any return at all. The Form 1040 petitioner filed gave no information from which a tax could be computed and was not a return within the meaning of the Internal Revenue Code or the Treasury Regulations. See *United States* v. *Daly,* 481 F. 2d 28, 29 (C.A. 8), certiorari denied, 414 U.S. 1064; *United States* v. *Porth,* 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824. This Court's opinion in *Sullivan* forecloses such an unsupported, blanket claim of privilege (274 U.S. at 263-264): "It would be an extreme if not an extravagant application of the

Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime."

This Court's recent decision in *Garner* v. *United States,* 424 U.S. 648, is not to the contrary. In that case, the defendant's income tax returns, upon which he stated that he was a gambler, were introduced in evidence, over his Fifth Amendment objection, as proof of the federal gambling offense with which he was charged. The Court observed that although petitioner could have claimed the privilege against self-incrimination instead of answering the question as to his occupation, he failed to do so and elected to disclose the fact that he was a gambler. In those circumstances, the Court concluded that his disclosure was not "compelled" within the meaning of the Fifth Amendment. But *Garner* does not indicate that a taxpayer may refuse to state the amount of his income or disclose sufficient information from which the amount of his tax liability may be computed.

2. Petitioner further argues (Pet. 8-19) that the trial court erred in refusing to permit him to be represented at trial by a friend who was not a lawyer.[1] But a criminal defendant has no constitutional right to representation by

---

[1]Petitioner also claims (Pet. 20-21) that he was the victim of discrimination because he was denied the right to be represented at trial by a non-lawyer friend, while the prosecutor was assisted by an employee of the Internal Revenue Service who was not a lawyer. But the Internal Revenue Service employee did not try the case; he only assisted the prosecution with some of the clerical details relating to the exhibits.

a non-lawyer. See, *e.g.*, *United States* v. *Cooper*, 493 F. 2d 473, 474 (C.A. 5), certiorari denied, 410 U.S. 859; *United States* v. *Whitesel*, 543 F. 2d 1176, 1177-1180 (C.A. 6), certiorari denied, June 13, 1977 (No. 76-1378); *United States* v. *Ellsworth*, 547 F. 2d 1096 (C.A. 9), certiorari denied, 431 U.S. 931.

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense." As the court of appeals pointed out (Pet. App. 2), the right to counsel guaranteed by the Sixth Amendment refers to a person authorized to practice law. *United States* v. *Afflerbach*, 547 F. 2d 522 (C.A. 10); *United States* v. *Grismore*, 546 F. 2d 844 (C.A. 10). The purpose of the guarantee is to ensure the availability, if it is sought, of the guiding hand of counsel at every critical step in the proceedings against a defendant, including "the giving of effective aid in the preparation and trial of the case." *Harrison* v. *United States*, 387 F. 2d 203, 212 (C.A. D.C.). This purpose is not met when the accused seeks to be represented by a non-lawyer. *United States* v. *Jordon*, 508 F. 2d 750 (C.A. 7), certiorari denied, 423 U.S. 843; *McKinzie* v. *Ellis*, 287 F. 2d 549 (C.A. 5).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.